

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 CHARLES MARSHALL,

5 Plaintiff,

6 v.

7 SILVER STATE DISPOSAL SERVICE, INC.
8 d/b/a/ REPUBLIC SERVICES of
SOUTHERN NEVADA,

9 Defendant.
10

Case No. 2:15-cv-00953-APG-PAL

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS AND GRANTING LEAVE TO
FILE AMENDED COMPLAINT**

[Dkt. #9]

11 After his alleged unlawful termination in September 2014, former sanitation worker
12 Charles Marshall sued his former employer, Republic Services of Southern Nevada, asserting
13 claims for age discrimination under the Age Discrimination in Employment Act (“ADEA”),
14 disability discrimination under the Americans with Disabilities Act (“ADA”), violation of the
15 duty of fair representation under the National Labor Relations Act (“NLRA”), and breach of
16 federal drug-testing regulations.¹ Based on Republic’s motion,² I dismiss all of Marshall’s claims
17 except his ADEA age-discrimination claim based on disparate treatment and give him until April
18 21, 2016, to file an amended complaint if he wishes to do so.

19 **Background³**

20 Marshall worked at Republic as a garbage helper from 1993 until his September 2014
21 termination.⁴ On August 26, 2014, Republic selected Marshall for a random drug and alcohol
22 test.⁵ He reported to the internal testing facility but he was not able to provide a urine sample
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24 ¹ See ECF 1.

25 ² ECF 9.

26 ³ These facts are taken from Marshall’s complaint and accepted as true for purposes of this
motion. This section is not intended as findings of fact.

27 ⁴ ECF 1 at ¶¶ 13, 15.

28 ⁵ *Id.* at ¶ 36.

1 “due to his extreme nervousness owing to his diabetic (sic), high blood pressure and
2 sleeplessness.”⁶ Marshall does not allege that he told anyone at Republic or the testing facility
3 about these issues. He was later transported to an outside drug-testing facility where he tested
4 negative, but, according to Marshall, the evaluating doctor canceled his results “for
5 incomprehensible reasons and owing to some pressure from Republic.”⁷

6 Marshall alleges that he suffers “from disability because of shoulder and knee surgery
7 occurred due to continuous lifting, bending, moving, and jerking his vertebral column, along with
8 bad knees in performing his job of high mobility and lifting weights.”⁸ He also alleges that he
9 suffers from various other conditions including “high blood pressure, sleeplessness, diabetes, and
10 other affects from shoulder, wrist surgeries and continuous problems with his ankles.”⁹

11 Marshall claims that he was fired because of his age and disabilities.¹⁰ He asserts five
12 claims for relief: (1) age discrimination in violation of the ADEA, (2) violation of the duty of fair
13 representation, (3) violation of the Republic handbook agreement between Teamsters Union and
14 Local 631, (4) violation of the ADA, and (5) violation of 49 C.F.R. § 40 and § 382.107. Republic
15 moves to dismiss all of Marshall’s claims under Federal Rule of Civil Procedure 12(b)(6).

16 Discussion

17 A. Standards for a motion to dismiss

18 Federal Rule of Civil Procedure 8 requires every complaint to contain “[a] short and plain
19 statement of the claim showing that the pleader is entitled to relief.”¹¹ Though Rule 8 does not
20 require detailed factual allegations, the properly pleaded claim must contain enough facts to “state
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23 ⁶ *Id.* ¶ 39.

24 ⁷ *Id.* at ¶¶ 51–53.

25 ⁸ *Id.* at ¶ 35.

26 ⁹ *Id.* at ¶ 44.

27 ¹⁰ *Id.* at ¶ 65.

28 ¹¹ FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

1 a claim to relief that is plausible on its face.”¹² This “demands more than an unadorned, the-
 2 defendant-unlawfully-harmed-me accusation”; the facts alleged must raise the claim “above the
 3 speculative level.”¹³ In other words, a complaint must make direct or inferential allegations about
 4 “all the material elements necessary to sustain recovery under *some* viable legal theory.”¹⁴

5 District courts employ a two-step approach when evaluating a complaint’s sufficiency on
 6 a Rule 12(b)(6) motion to dismiss. First, the court must accept as true all well-pleaded factual
 7 allegations in the complaint, recognizing that legal conclusions are not entitled to the assumption
 8 of truth.¹⁵ Mere recitals of a claim’s elements, supported only by conclusory statements, are
 9 insufficient.¹⁶ Second, the court must consider whether the well-pleaded factual allegations state
 10 a plausible claim for relief.¹⁷ A claim is facially plausible when the complaint alleges facts that
 11 allow the court to draw a reasonable inference that the defendant is liable for the alleged
 12 misconduct.¹⁸ A complaint that does not permit the court to infer more than the mere possibility
 13 of misconduct has “alleged—but not shown—that the pleader is entitled to relief,” and it must be
 14 dismissed.¹⁹

15 **B. Marshall states a plausible age-discrimination claim based on disparate treatment,**
 16 **but not under a disparate-impact theory.**

17 Republic first argues that Marshall’s ADEA claim must be dismissed because he does not
 18 sufficiently plead exhaustion of his administrative remedies.²⁰ Republic next argues that, even if
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20 ¹² *Twombly*, 550 U.S. at 570.

21 ¹³ *Iqbal*, 556 U.S. at 678.

22 ¹⁴ *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
 23 1106 (7th Cir. 1989)) (emphasis in original).

24 ¹⁵ *Iqbal*, 556 U.S. at 678–79.

25 ¹⁶ *Id.*

26 ¹⁷ *Id.*

27 ¹⁸ *Id.*

28 ¹⁹ *Twombly*, 550 U.S. at 570.

²⁰ ECF 9 at 10.

1 Marshall has exhausted his administrative remedies, he fails to state a claim under either a
2 disparate-impact or disparate-treatment theory.²¹

3 For a district court to have jurisdiction over an ADEA claim, the plaintiff must have
4 exhausted all available administrative remedies by timely filing a charge with the EEOC.²²
5 Marshall alleges that “[a]ll conditions precedent to the institution of this lawsuit has (sic) been
6 fulfilled including filing with EEOC”²³ and that he “has exhausted his administrative remedies
7 under the ADEA.”²⁴ The complaint does not indicate when he filed a charge with the EEOC or
8 what claims or allegations he brought before the EEOC. But Marshall attaches to his response his
9 charge of discrimination with the Nevada Equal Rights Commission (“NERC”) dated December
10 2, 2014, in which he alleges that Republic discriminated against him because of his age and
11 disability when it fired him in September 2014 after the drug-test incident.²⁵ I therefore decline to
12 dismiss Marshall’s ADEA claim for failure to exhaust administrative remedies. I next consider if
13 he states a plausible claim.

14 A disparate-impact claim challenges “employment practices that are facially neutral in
15 their treatment of different groups but that in fact fall more harshly on one group than another and
16 cannot be justified by business necessity.”²⁶ Marshall alleges that Republic’s drug-testing policy
17 is a facially neutral policy that has a “disparate impact” on employees over 40.²⁷ Marshall does
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19 ²¹ ECF 9 at 10–11.

20 ²² *B.K.B. Maui Police Dep’t*, 276 F.3d 1091, 1099 (9th Cir. 2002).

21 ²³ ECF 1 at ¶ 4.

22 ²⁴ *Id.* at ¶ 68.

23 ²⁵ ECF 10-1 at 9–10. A charge filed with the NERC is constructively filed with the
24 EEOC. An ADEA plaintiff can satisfy the exhaustion requirement by filing a charge of
25 discrimination with the EEOC or the equivalent state agency and waiting 60 days. *Sanchez v.*
26 *Pac. Power Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). The NERC sent Marshall’s charge to the
27 EEOC, which assigned it an EEOC case number on December 8, 2014. ECF 10-1 at 15. The
28 EEOC later closed the charge and send Marshall a dismissal and notice of rights. ECF 10-1 at 22.

²⁶ *Pottenger v. Potlach Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) (internal quotations
omitted).

²⁷ ECF 1 at ¶ 43.

1 not clarify what specific part of the drug-testing policy has a disparate impact. For instance, it is
 2 unclear whether he challenges Republic's random drug-testing policy in general or Republic's
 3 "shy bladder" practice.²⁸ Marshall also does not allege any facts to show that Republic's drug-
 4 testing policy has a disparate impact on persons over 40 because he does not allege that any other
 5 employee over 40 was terminated for failing to provide a urine sample on demand. Marshall's
 6 conclusory allegations fail to state a claim for age discrimination based on disparate impact and I
 7 therefore dismiss his ADEA claim to the extent it is based on a disparate-impact theory.

8 To make a prima facie case of age discrimination based on disparate treatment, Marshall
 9 must allege that he was (1) 40 or older, (2) performing his job satisfactorily, (3) discharged, and
 10 (4) replaced by a substantially younger employee with equal or inferior qualifications or some
 11 other circumstances leading to an inference of age discrimination.²⁹

12 Marshall pleads a plausible ADEA claim based on disparate treatment. He alleges that he
 13 is "over fifty-six years of age,"³⁰ and it can plausibly be inferred from Marshall's complaint that
 14 he was performing his job satisfactorily because he alleges that he received positive job-
 15 performance reviews throughout his 21-year career at Republic.³¹ Marshall sufficiently alleges
 16 that he suffered an adverse employment action when he was fired in September 2014.³² Finally,
 17 it is plausible that Marshall's replacement had equal or lesser qualifications than Marshall given
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19 ²⁸ Further muddying the waters, in other parts of the complaint, Marshall also appears to
 20 allege that Republic's termination policies have a disparate impact. *Id.* at ¶ 85.

21 ²⁹ *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 142 (1990), *superseded by*
 22 *statute on other grounds as stated in Hong Yin v. N. Shore LIJ Health Sys.*, 20 F. Supp. 3d 359,
 371 (E.D.N.Y. 2014).

23 ³⁰ ECF 1 at ¶ 13.

24 ³¹ *Id.* at ¶ 28.

25 ³² Marshall also appears to allege adverse employment actions based on a supervisor
 26 calling him "too slow" in reference to his age, ECF 1 at ¶ 30, and based on another supervisor's
 27 failure to give him Gatorade. *Id.* at ¶ 33. These do not constitute adverse employment actions.
 28 *See Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) ("Among those employment
 decisions that can constitute an adverse employment action are termination, dissemination of a
 negative employment reference, issuance of an undeserved negative performance review and
 refusal to consider for promotion.").

1 Marshall's 21-year employment history with Republic.³³ Marshall also alleges that his
 2 replacement is substantially younger than him because he alleges that his replacement is outside
 3 the protected class, which would make his replacement under age 40 and at least 16 years
 4 younger than Marshall.³⁴ I therefore deny Republic's motion to dismiss Marshall's ADEA claim
 5 to the extent it is based on a disparate-treatment theory.

6 **C. Marshall's fair-representation claim fails as a matter of law.**

7 Republic argues that Marshall's fair-representation claim fails because the union is the
 8 exclusive bargaining representative for its members, so Republic does not owe Marshall any duty
 9 of fair representation.³⁵ Even if Marshall states a fair-representation claim, Republic argues that
 10 the claim is time-barred.³⁶ In response, Marshall rehashes his allegations that the union breached
 11 its duty to adequately represent him and argues that there "is no applicable statute of limitation"
 12 for fair-representation claims.³⁷

13 Republic is correct that this claim fails because fair-representation claims are not
 14 cognizable against employers.³⁸ Because Marshall did not name the union as a defendant in this
 15 lawsuit, he does not state a plausible claim for breach of the duty of fair representation.
 16 Accordingly, this claim is dismissed.

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21 ³³ ECF 1 at ¶ 15.

22 ³⁴ ECF 1 at ¶¶ 34, 70.

23 ³⁵ ECF 9 at 6.

24 ³⁶ *Id.*

25 ³⁷ *Id.* at 14.

26 ³⁸ See *Bowen v. U.S. Postal Serv.*, 459 U.S. 212, 240 (1983) (White J., concurring) ("The
 27 union owes [a] duty of fair representation to the employees it represents-the duty does not run to
 28 the employer . . ."); see also *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) ("A breach of the statutory
 duty of fair representation occurs only when a *union's* conduct . . . , is arbitrary, discriminatory,
 or in bad faith.") (emphasis added).

D. Marshall does not state a plausible claim for breach of the collective-bargaining agreement.

In claim three, Marshall appears to allege that Republic breached its collective-bargaining agreement with the union. He references two provisions of the handbook that he apparently believes Republic violated³⁹ and alleges that Republic's policies "caused disparate impact."⁴⁰

Republic argues that this common-law breach-of-contract claim is preempted by § 301 of the Labor Management Relations Act.⁴¹ And even if Marshall's claim is construed as a § 301 claim, it still fails because it is time-barred and lacks factual support.⁴² Leaving most of Republic's arguments unaddressed, Marshall responds that Republic violated the collective-bargaining agreement by failing to follow the agreed-to termination procedures.⁴³

First, to the extent Marshall intends to assert a common-law breach-of-contract claim, it fails because § 301 preempts state-law claims that require interpretation of the terms of a collective-bargaining agreement.⁴⁴ Second, to the extent Marshall intends to assert a claim under § 301, that also fails. Section 301 allows for suits for violations of collective-bargaining agreements between labor organizations and employers.⁴⁵ But a plaintiff cannot proceed on a § 301 claim against his employer without establishing a breach of the duty of fair representation by his union,⁴⁶ and, as explained above, Marshall has not sufficiently alleged that the union

³⁹ ECF 1 at ¶¶ 82, 82.

⁴⁰ *Id.* at ¶ 85.

⁴¹ ECF 9 at 7.

⁴² *Id.*

⁴³ ECF 10 at 18.

⁴⁴ *Allis-Chalmers Corp. v. Lucek*, 471 U.S. 202, 210 (1985).

⁴⁵ *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976).

⁴⁶ Because Marshall also asserted a fair-representation claim, he may be attempting to assert a "hybrid" claim under § 301. A hybrid § 301 claim is two separate but "inextricably intertwined" claims, one against the employer and one against the union. To prevail, a plaintiff must allege both that the employer violated the collective bargaining agreement and that the union breached its duty of fair representation to him. *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164-65 (1983). An employee may elect to sue only the employer and not the union, "but the case he must prove is the same whether he sues one, the other or both." *Id.* at 165.

1 breached its duty. Marshall also does not allege any facts to show how Republic violated the
2 collective-bargaining agreement.⁴⁷ I therefore dismiss claim three.

3 **E. Marshall does not state a plausible claim under the ADA for either disparate**
4 **treatment or failure to accommodate.**

5 Marshall alleges that Republic's acts "were a violation of [his] rights under the ADA."⁴⁸
6 Marshall claims that Republic failed to provide him reasonable accommodations despite knowing
7 that he needed them "as this was obvious from his reported backbone injuries, and surgeries."⁴⁹
8 Republic argues that this claim must be dismissed because Marshall does not sufficiently plead
9 exhaustion of administrative remedies or discrimination based on disparate treatment or failure to
10 accommodate.⁵⁰ Marshall responds that he has "a demonstrated disability backbone impairment
11 issues and prostate issues," and appears to argue that Republic failed to accommodate these
12 disabilities.⁵¹

13 Marshall has shown that he exhausted his administrative remedies under the ADA.
14 Though his complaint is sparse on exhaustion details, he attaches to his response a disability-
15 discrimination charge with the EEOC and his right to sue letter.⁵²

16 To state a plausible claim for discrimination based on disparate treatment under the ADA,
17 Marshall must allege that (1) he suffers from a disability under the ADA, (2) he is otherwise
18 qualified to perform the essential functions of his job with or without reasonable accommodation,
19 and (3) Republic discriminated against him because of his disability.⁵³ The ADA also "prohibits
20 an employer from discriminating against a qualified individual with a disability by failing to
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22 ⁴⁷ Section 301 claims are also governed by a six-month statute of limitations.

23 ⁴⁸ ECF 1 at ¶ 93.

24 ⁴⁹ *Id.* at ¶ 94.

25 ⁵⁰ ECF 9 at 11–12.

26 ⁵¹ ECF 10 at 22.

27 ⁵² ECF 10-1 at 9—10 (charge of discrimination); ECF 10-1 at 22—24 (notice of dismissal
and right to sue).

28 ⁵³ *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1249 (9th Cir. 1999).

1 make ‘reasonable accommodations to the known physical or mental limitations’ of that
2 individual.”⁵⁴

3 Marshall fails to state an ADA claim under either theory. Marshall does not allege any
4 facts to show that he suffered disparate treatment because of a disability. Nowhere in the 16
5 paragraphs of allegations within this claim does Marshall identify what disability he believes
6 Republic discriminated against him for having or how Republic discriminated against him. In the
7 body of the complaint, Marshall identifies a laundry-list of ailments including “shoulder and knee
8 surgery,” “bad knees,” “diabetes,” “high blood pressure,” “sleeplessness,” “wrist surgeries,”
9 “problems with his ankles,” and “bad backbone frame.”⁵⁵ But even assuming that any or all of
10 these qualify as disabilities under the ADA, Marshall does not allege any facts that plausibly link
11 his September 2014 termination, or any other disparate treatment, to these disabilities.

12 Marshall’s accommodations-based claim is likewise factually deficient. The only
13 disability that Marshall alleges Republic knew about is his back injury. But he offers no facts
14 indicating when he reported this injury or to whom, and he does not specify what reasonable
15 accommodations he believes he was entitled to for this injury that Republic denied. I therefore
16 dismiss Marshall’s disability-discrimination claim.

17 **F. Marshall’s 49 C.F.R. § 40 and § 382.107 claim fails as a matter of law.**

18 Marshall’s fifth and final claim alleges that Republic violated the drug-testing policies set
19 forth in 49 C.F.R. § 40 and § 382.107. Republic argues that these provisions, which authorize the
20 Secretary of Transportation to prescribe drug-testing programs for commercial vehicle
21 transportation, do not create a private cause of action.⁵⁶ Marshall offers no meaningful response
22 to Republic’s argument; he simply maintains that Republic violated these provisions. Republic is
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25 ⁵⁴ *Willis v. Pac. Maritime Ass’n*, 244 F.3d 675, 680 (9th Cir. 2001) (quoting 42 USC
26 § 12112(b)(5)(A)).

27 ⁵⁵ ECF 1 at ¶¶ 35, 39, 44, 45.

28 ⁵⁶ ECF 9 at 8.

1 correct that these provisions do not create a private cause of action,⁵⁷ so I dismiss claim five with
2 prejudice.

3 **G. Leave to amend**

4 Though Marshall does not request leave to cure the deficiencies in his complaint, the
5 Ninth Circuit has repeatedly held that “a district court should grant leave to amend even if no
6 request to amend the pleading was made, unless it determines that the pleading could not possibly
7 be cured by the allegation of other facts.”⁵⁸ Because claim five cannot be cured by amendment, I
8 deny Marshall leave to amend it. However, Marshall is granted leave to amend claims one, two,
9 three, and four if he can plead facts to cure their deficiencies. If Marshall chooses to file an
10 amended complaint, he must do so by **April 21, 2016**. If Marshall fails to file an amended
11 complaint by then, this case will proceed only on claim one for age discrimination based on a
12 disparate-treatment theory.

13 **Conclusion**

14 IT IS THEREFORE ORDERED that defendant’s motion to dismiss [ECF 9] is
15 **GRANTED in part**. Claims two, three, and four are dismissed without prejudice, and claim five
16 is dismissed with prejudice.

17 IT IS FURTHER ORDERED that plaintiff has until **April 21, 2016** to file an amended
18 complaint. If plaintiff fails to file an amended complaint by this date, this case will proceed on
19 claim one under a disparate-treatment theory only.

20 DATED this 31st day of March, 2016.

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22 _____
23 ANDREW P. GORDON
24 UNITED STATES DISTRICT JUDGE
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26 ⁵⁷ See *Drake v. Delta Airlines, Inc.*, 147 F.3d 169, 171 (2d Cir. 1998); *Abate v. S. Pacific*
27 *Transp. Co.*, 928 F.2d 167 (5th Cir. 1991).

28 ⁵⁸ *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (internal quotation marks and
citations omitted).